Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1209

LONG MFG., N.C., INC., *Petitioner,*

v.

SARAH HELEN WILLIAMS DOLLAR, and
NICHOLS TRACTOR COMPANY, INC., *Respondents.*

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES Now the Respondent Sarah Helen Williams Dollar and prays that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 561 F.2d 613 and is reproduced in the Appendix to the Petition.

JURISDICTION

Respondent accepts the statement of Petitioner as to jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

There are no questions presented in the Petition justifying the issuance of the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. In addition, Questions 1 and 2 in the Petition are now moot.

RULES AND STATUTES INVOLVED

1. Rule 26(b)(1), Federal Rules of Civil Procedure
2. Rule 33(a), Federal Rules of Civil Procedure
3. Rule 37(a)(3), Federal Rules of Civil Procedure
4. Rule 401, Federal Rules of Evidence
5. Rules 403, Federal Rules of Evidence
6. Rule 407, Federal Rules of Evidence
7. Ga. Code Ann. § 20-701
8. Ga. Code Ann. § 38-510
9. Ga. Code Ann. § 39-604
10. Ga. Code Ann. § 105-2012

STATEMENT OF THE CASE

Respondent deems it necessary to make certain additions and corrections to Petitioner's Statement of the Case.

This is a products liability case brought by Sarah Helen Williams Dollar against Long Mfg., N.C., Inc., for the wrongful death of her son, James D. Dollar, who was killed while operating a backhoe designed, manufactured, and marketed by the Respondent. The

death occurred when the backhoe unit raised clear of the ground and swung backwards, with respect to the backhoe and its operator, into the rear of the John Deere tractor to which it was attached. James Dollar was thereby crushed between the rollbar-canopy assembly attached to the rear of the tractor over the driver's seat and the control panel of the backhoe located directly in front of its operator. (T. 47, 51, 69-70).

After the suit was commenced, the Petitioner impleaded Nichols Tractor Company, Inc., who had sold the backhoe to the decedent's employer and had installed the rollbar-canopy to the tractor, as a third-party defendant. The case proceeded to trial and was submitted to a jury. When the jury was unable to reach a verdict after several hours of deliberation, the Court directed a verdict for Petitioner pursuant to its motion made at the close of Respondent's evidence and renewed at the close of Petitioner's evidence. (T. 579-580). The judgment was reversed by the United States Court of Appeals for the Fifth Circuit. 561 F.2d 613 (1977).

Prior to the institution of the action in the United States District Court For The Middle District of Georgia, the Plaintiff, Plaintiff's husband, Nichols Tractor Company, Inc., John Deere Company, and John Deere Insurance Company executed a loan Agreement which, in every fact and particular, represented a Covenant Not To Sue as permitted by Georgia law, with the Agreement including certain contingent payback provisions. The clearly expressed intent of the Agreement was that Plaintiff would pursue her claim against Petitioner and would repay the lenders out of any proceeds therefrom.

Subsequent thereto, an insurance company draft containing the following language on the reverse side was endorsed: "Endorsement hereof acknowledges that this payment is offered and received in full satisfaction of the claim(s) identified on the other side; and that upon acceptance any payment of this draft, the John Deere Insurance Company is hereby released and discharged of said claim(s)". The testimony of all parties to the Agreement was unquestionable that the language on the reverse side of the check was a mistake, was not applicable to the situation in question, and the intent was that it was to be stricken. The testimony of all parties to the Agreement, including Plaintiff, was that there was absolutely no intent to release Petitioner or anyone else, and there was no intent to release her cause of action.

During the course of discovery, Petitioner was served with an Interrogatory inquiring about similar accidents occurring either before or after the incident here in question. Petitioner responded that it had "no present knowledge of any accidents, injuries, or deaths resulting from the operation of the particular backhoe model in question prior to the incident which forms the subject matter of this litigation". No objection was filed. Approximately a month prior to trial, Respondent took the deposition of several agents of Petitioner and discovered for the first time that there had been subsequent accidents similar to the one in question, likewise resulting in deaths. At that time Respondent filed her Motion To Compel Discovery based both upon the evasive answer to an Interrogatory and the refusal during the deposition to disclose information regarding the other accidents. That Motion was denied.

After the decision of the United States Court of Appeals, Respondent served upon Petitioner an Interrogatory inquiring about similar accidents occurring both prior to and subsequent to the incident here in question. On January 11, 1978 Respondent served its Answer to that Interrogatory giving the information requested fully and completely. (A.1).

Some time after the incident in question, Respondent sent to its dealers a letter bearing the name of Respondent's Director of Engineering. That letter stated that "It has been determined that a backhoe operator can be crushed to death against the rollbar or safety cab where the backhoe is not rigidly mounted . . .". On the eve of trial Respondent filed a Motion In Limine and, based thereon, the Trial Court ruled that Petitioner could not mention or otherwise allude to any warning issued by Petitioner with regard to the equipment involved. Petitioner's Director of Engineering then testified at the trial that, in his opinion, the backhoe was safe to operate on a tractor equipped with a rollbar. (T. 412). Counsel for Respondent was not allowed to cross-examine the witness as to this apparent contradiction. (T. 424-426).

At the time of his death, James Dollar was using the backhoe to dig for and locate a water line. (T. 438-439; T. 47, 51, 69). There were no eyewitnesses to the events immediately preceding the incident; but Respondent's expert witness testified that, based on his investigations and tests with the equipment involved, the backhoe unit lifted off of the ground when its bucket encountered sufficient resistance from the soil in which it was digging until the seat was lifted up and back to a point where the operator would be crushed with his back against the rollbar-canopy of the tractor and his chest

against the backhoe controls. (T. 142-146, 157). He further testified that the design of the unit was, in his opinion, negligent and defective because of those tendencies and because no means was provided to prevent the backhoe from raising clear of the ground. (T. 144-145). Respondent's Director of Engineering admitted that the backhoe, when properly attached to a tractor, might lift off of the ground and move with respect to the tractor during its operation. (T. 123-124, 126-129; T. 378-379). Finally, the evidence showed that an inexpensive, minor addition could be made to the backhoe which would prevent the backhoe from lifting off of the ground, thereby preventing incidents such as the one here involved.

REASONS FOR THE DENIAL OF THE WRIT

The Petitioner's "Reasons For The Allowance Of The Writ" are divided into three sections, corresponding to the three basic errors found by the Appellate Court. *Dollar* v. *Long Mfg., N.C., Inc.*, 561 F.2d 613 (5th Cir. 1977). Petitioner suggests that, because of the "fatal weakness of plaintiff's claim" the Court of Appeals "incredibly, reversed". Despite such assertions by Petitioner, that Court was correct in each of its holdings and each holding, separately or in conjunction with the others, demanded reversal and remand for a new trial. Respondent will deal with each of the three "Reasons" of Petitioner in the order set forth in the Petition.

I. The United States Court of Appeals for the Fifth Circuit Correctly Held That the Trial Court Erred in Denying Respondent's Motion to Compel Discovery; That Court Did Not Depart From the Accepted and Usual Course of Judicious Appellate Proceeding and No Supervision of That Power by This Court Is Warranted. This Issue Is Now Moot.

As pointed out in Respondent's "Statement of the Case", subsequent to the decision of the Court of Appeals, Petitioner responded to an Interrogatory, supplying all information requested of it and which it here argues it should not be required to furnish. This Court has repeatedly held that it will not entertain a moot issue or one that becomes moot during the pendancy of the action. *Sears, Roebuck and Company* v. *Carpet, Linoleum, Soft Tile and Resilient Floor Covering League, Local Union No. 419, AFL-CIO*, 397 U.S. 655 (1970); *Hall* v. *Beals*, 396 U.S. 45 (1969). By furnishing that information in the normal course of discovery which it objects to furnishing, Petitioner has effectively made the issue moot.

Not withstanding the foregoing, the Court of Appeals correctly held that the Trial Court erred in denying Respondent the right to discover facts concerning similar incidents subsequent to the one in question. Initially it must be noted that any evidence that is relevant and admissible at trial must, as a matter of basic logic and as stated in the Federal Rules of Evidence, be discoverable. Rule 26(b)(1), Federal Rules of Civil Procedure. Relevant evidence is defined as ". . . evidence having any tendency to make the existence of any fact that is of consquence to the determination of the action more probable or less probable than it would be without the evidence". Rule 401, Federal Rules of Evidence. As to the issue of admissibility, Petitioner urges that similar accidents could be relevant only to

the issue of notice. Such is clearly not the case. Similar accidents can be relevant, also, to the issue of causation and this is especially true in products liability cases such as the one at bar. *Cunningham* v. *Gans,* 507 F.2d 496 (2d Cir. 1974); *Bailey* v. *Kawasaki-Kisen K. K.,* 455 F.2d 392 (5th Cir. 1972); *Uitts* v. *General Motors Corporation,* 58 F.R.D. 450 (E.D. Pa. 1972); *Becker* v. *American Airlines, Inc.,* 200 F. Supp. 243 (S.D. N.Y. 1961).

> If similar accidents with identical equipment are relevant to the determination of causation, subsequent accidents would appear to be as relevant as prior accidents. While only earlier accidents can be relevant to the issue of notice, causation is an issue affected only by the circumstances and the equipment, and is not related to the date of the occurrence.
>
> *Uitts* v. *General Motors Corporation* at 452.

Even if the evidence sought to be discovered is not admissible, it is discoverable if ". . . reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), Federal Rules of Civil Procedure. In a case such as this where there are no eyewitnesses, evidence of other accidents may be the only way to discover the actual cause of the incident and death. Likewise, whether the death was operator error, as contended by Petitioner, or due to certain modifications, as contended by Petitioner, or was due to the negligent or defective design of the equipment, as contended by Respondent and her expert witness, may well be determined by discerning the propensity for other similar incidents to occur with similar equipment. Such evidence is within the scope of the Federal Rules of Civil

Procedure and should be discoverable. *Uitts* v. *General Motors Corporation; Tytel* v. *Richardson-Merrell, Inc.,* 37 F.R.D. 351 (S.D. N.Y. 1965).

The Court of Appeal's ruling as to discovery was based on two separate grounds and that Court's decision was justified on the other ground as well. Respondent filed her Motion To Compel Discovery immediately after learning that there had been subsequent deaths with similar equipment. That point in time is also when Respondent realized that Petitioner's Answer to her previous Interrogatory had been evasive, incomplete and inaccurate. Petitioner waived its right to object to that Interrogatory by not doing so within thirty (30) days of service. Rule 33(a), Federal Rules of Civil Procedure. *C. Albert Sauter Company, Inc.* v. *Richard S. Sauter Company, Inc.,* 368 F. Supp. 501 (E.D. Pa. 1973); *Cowie* v. *Continental Oil Company,* 28 F.R.D. 384 (S.D. N.Y. 1961). Petitioner's contention that Respondent, by delay, waived its right to compel a more complete response fails for two reasons. First, Rule 37(a)(3), Federal Rules of Civil Procedure, states that an evasive or incomplete answer is equivalent to a failure to answer. Petitioner's answer was both evasive and incomplete and, immediately upon learning those facts, Respondent filed her Motion. Second, the Motion also sought to compel officers and agents of Petitioner to answer similar questions on their depositions. The Motion was filed immediately after those depositions. There was no time delay as there was after the Interrogatory.

Contrary to the contention of Petitioner, this ground standing alone would warrant reversal and remand. Even assuming that Respondent failed to make out her case (an incorrect assumption), such failure would be,

in great part, due to the denial of discovery thereby preventing Respondent from gathering the necessary facts and witnesses to make an even stronger case. The suggestion that this is merely a collateral issue is to imply that causation is a collateral issue. Causation is the central issue in any products liability or other tort action and this case is no exception.

This Court has held that the purpose of discovery is so that the parties may become aware of the facts and properly prepare their cases. *Hickman* v. *Taylor,* 329 U.S. 495 (1947). The result is that a trial becomes ". . . a fair contest with the basic issues and facts disclosed to the fullest practical extent." *United States* v. *Proctor & Gamble Company,* 356 U.S. 677 (1958). The holding of the Court of Appeals effectuates these goals.

II. The United States Court of Appeals for the Fifth Circuit Correctly Held That the Trial Court Erred in Preventing Respondent From Using Certain Evidence for Impeachment of Petitioner's Agent-Expert and No Review of That Holding Is Warranted.

Subsequent to the incident in question Petitioner sent a letter bearing its Director of Engineering's name to all dealers stating ". . . it has been determined that a backhoe operator can be crushed to death against the rollbar or safety cab where the backhoe is not rigidly mounted . . .". After the Trial Court sustained Petitioner's Motion In Limine preventing reference to that document the same Director of Engineering testified, without fear of cross-examination, that, in his opinion, the backhoe could be safely operated on a tractor with attached rollbar—a direct contradiction.

Petitioner attempts to camouflage this by first calling the document "hearsay". This ignores several of the most common exceptions to the hearsay rule: prior inconsistent statement, business records exception, declaration against interest, admission of a party opponent. Next, Petitioner suggests the statement is not inconsistent, apparently because the language requires that the backhoe be "rigidly mounted". This ignores the facts that all literature with regard to the backhoe indicates it is not a rigid-mounting machine; this was its advertised feature. In fact, the backhoe could not be rigidly mounted (absent some modification never considered, studied, or constructed by Petitioner).

Second, Petitioner urges that the witness was not the "author" of the document. The witness was an agent of the Petitioner; he was Petitioner's Director of Engineering; he designed this particular piece of equipment; and, the document bears his name. These facts certainly warrant the use of this document to impeach that particular witness.

Petitioner's final attempt to camouflage the document is to state that it is over a year old and the agent-expert is testifying as to his "current opinion". This is precisely what a prior inconsistent statement is. It seems impossible to have two or more inconsistent statements all made at precisely the same time.

Rule 407, Federal Rules of Evidence, explicitly states that there is an exception to the rule preventing reference to subsequent remedial measures—that being for the purpose of impeachment. *Bailey* v. *Kawasaki-Kisen K. K.,* 455 F.2d 392 (5th Cir. 1972); *American Airlines, Inc.* v. *United States,* 418 F.2d 180 (5th Cir. 1969). The general rule is based on the policy con-

ception that, to allow admissibility generally would deter remedial measures in the furtherance of safety. Rule 407, Federal Rules of Evidence, Comm. Notes. To allow directly contradictory testimony, especially as in the situation here, with advance knowledge that such testimony must go unchallenged demands an exception to the general rule. If Petitioner desires such testimony not to be used, the obvious solution is for its agent-expert not to testify in direct contradiction to the prior statement.

Rule 403, Federal Rules of Evidence, excludes evidence having probative value or that would otherwise be admissible if its value is substantially outweighed by the danger of unfair prejudice. The impeachment of Petitioner's agent-expert witness by the introduction of this evidence would obviously have had a much broader effect than merely to controvert his expressed opinion; but that effect could hardly be termed "unfair prejudice". It would go no further than to show the willful fallacies in Long's defensive strategy. This is, of course, permissible. *American Airlines, Inc.* v. *United States; Bailey* v. *Kawasaki-Kisen K. K.* As stated by the Court of Appeals, all evidence is prejudicial" or it is not material. No unfairness exists. 561 F.2d 348, 354.

This holding of the Court of Appeals is correct and it, too, warrants reversal and remand for a new trial. Respondent's case is based on the contention that the backhoe is dangerous as designed. Petitioner's defense was that the backhoe was safe to operate on a rollbar-equipped tractor and was not defectively designed. Contradiction and impeachment of Petitioner's primary defense is not a collateral matter of little importance to the case.

III. The United States Court of Appeals for the Fifth Circuit Correctly Held That the Agreement Should Not Have Been Submitted to the Jury and Did Not Have the Effect of Releasing Petitioner. No Review of That Holding by This Court Is Warranted.

Construction, interpretation, and effect of contracts in a diversity action are substantive matters to be controlled by the applicable state law. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938). Even, therefore, assuming that the decision of the Court of Appeals was in conflict with that of another Court of Appeals, those other decisions do not construe Georgia law and are not here applicable. As will be seen, the Court of Appeals correctly applied Georgia law in reversing the Trial Court on this ground. In any event, those cases from other Appellate courts are not in contradiction with the decision of the Court of Appeals below. These cases deal with the fact that parol evidence may be used by a stranger to an agreement, and that if the agreement is a release, then the joint tortfeasor is also released. *O'Shea* v. *New York, Chicago, and St. Louis Railroad Company,* 105 F. 559 (7th Cir. 1901). As will be seen, *infra,* the use of parol evidence in and of itself does not create a jury question and the decision of the Court of Appeals is correct and not in conflict with decisions of other circuits.

Petitioner spent the greater part of its Brief (and a significant amount of testimony at trial) urging that the Agreement was not a loan but a covenant not to sue. Under Georgia law, a covenant not to sue, unlike a release, does not serve to release other joint tortfeasors not parties to the covenant. *Moore* v. *Smith,* 78 Ga. App. 49, 50 S.E.2d 219 (1948). No evidence in the document or otherwise produced at trial contradicts this fact. Petitioner's evidence that the Insurer

may not have treated the indemnity provisions as a true loan has no effect on the construction of the document. Such a provision is necessitated by Ga. Code Ann. § 105-2012, allowing contribution among joint tortfeasors. The fact that the Agreement may not be a loan (which it was) does not have effect on the fact that it is a covenant not to sue.

The language of the Agreement clearly indicates that it was intended to be a covenant not to sue, not a release. By its very terms it called for Respondent to pursue her claim against Petitioner. It specifically stated that it was not a release. Finally, it contained language wherein Respondent agreed to execute a release in the future, if necessary, to protect the parties. Such language, under Georgia law, is not the equivalent of a release, has absolutely no present effect on anyone, and is, in fact, typical covenant not to sue language. *Chamblee* v. *Davie,* 88 Ga. 205 (1891). Ga. Code Ann. § 39-604 is inapplicable to a situation such as this but applies to those instances in which the Agreement comes after judgments were obtained against each Defendant or, after the Agreement, the claimant continued the action against the alleged wrongdoer with whom the Agreement was made. *Weems* v. *Freeman,* 234 Ga. 575, 216 S.E.2d 774 (1975); *Powell* v. *Davis,* 60 Ga. 70 (1878). Nowhere is there any evidence of any intention of the parties other than that this document was a covenant not to sue and that there was absolutely no intent to release Petitioner. No action was instituted by Respondent against the other party to the Agreement and no judgment was obtained against the third party which was then released.

Since Petitioner was not a party to the Agreement, it may introduce parol evidence but that, in and of itself, does not create an issue of fact. *Knight* v. *Lowery,* 228 Ga. 452, 185 S.E.2d 915 (1971). Petitioner's parol evidence concerned whether or not the insurer treated the payment as a loan. As previously stated, that has no effect on the document's nature as a covenant not to sue. Likewise, evidence of the Agreement barring enforcement of any future judgment and agreement to execute a release if necessary (both in the Agreement and parol) does not create a question of disputed fact but reinforces the fact that the document is a covenant not to sue.

Under Georgia law, construction of contracts is a matter for the courts unless there is a disputed, material issue of fact. Ga. Code Ann. § 20-701. Petitioner cited a case stating that intent may be such a fact. *Pinkerton & Laws Company* v. *Atlantis Realty, Inc.,* 128 Ga. App. 662, 197 S.E.2d 749 (1973). That Court specifically noted that no intent was expressed and the language of the letter Agreement left the question of intent unclear and disputed. 128 Ga. App. at 666. That situation does not exist in the case sub judice.

The endorsement of the insurer's draft does not alter the result. Parol evidence is admissible to show and rectify a mistake, Ga. Code Ann. § 38-510, and all such evidence revealed that the endorsement was not intended to effectuate a release. Second, the Agreement and the check must be construed together as a single contract. *Dyal* v. *Foy & Shemwell, Inc.,* 159 Ga. 848, 127 S.E. 228 (1924). When this is done, it is obvious that the only claim the check refers to is a contractual claim created by the Agreement and the in-

surance contract and that, as specifically stated in the Agreement, the Agreement was not a release.

Finally, and most important, it has been specifically held as a matter of law, that this identical check form was a settlement only for a claimant's contractual claims under an insurance policy. It does not constitute a complete release. *Bryant* v. *Rushing,* 121 Ga. App. 430, 174 S.E.2d 226 (1970). As an actual fact, the only entity purportedly released by the endorsement is the insurance company, not the alleged joint tortfeasor, and a release of one other than the joint wrongdoer does not release those who are tortfeasors. *Jet America, Inc.* v. *Gates Learject Corporation,* No. 54377 (Ga. App., decided Feb. 20, 1978); *Pennsylvania Thresherman & Farmers Mutual Casualty Insurance Company* v. *Hill,* 113 Ga. App. 283, 148 S.E.2d 83 (1966).

Petitioner's final contention that evidence of the payment is admissible as to damages is not correct. *Ford Motor Company* v. *Lee,* 237 Ga. 554, 229 S.E.2d 379 (1976), states that the judge should reduce any judgment by such sum, not that the evidence should be given to the jury for it to reduce the judgment.

The Court of Appeals correctly held that the document should be construed by the Court and not the jury and in holding that the documents ". . . did not constitute a release of a joint tortfeasor". 561 F.2d at 356. *Pennsylvania Thresherman & Farmers Mutual Casualty Insurance Company* v. *Hill.* Georgia law was properly interpreted and applied and review is not necessary.

CONCLUSION

The petition For A Writ Of Certiorari is ungrounded. The United States Court of Appeals' decision is correct as to each holding; each holding warrants reversal and remand. The Petition should be denied.

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APPENDIX

APPENDIX A

Responses of Long Mfg., N.C., Inc., to Plaintiff's First Interrogatories

INTERROGATORY: If you have knowledge of any accidents, incidents, or occurrences resulting in the bodily injury or death of an operator of a backhoe or similar model to the one in this suit, please state:

A. The number of such accidents, incidents, or occurrences of which you have knowledge;

B. The approximate dates of each such accident, incident, or occurrence;

C. The name and address of each person injured;

D. A brief description of each accident, incident, or occurrence, including specifically, how each injury or death was sustained;

E. Whether suit was filed against you, and if so, the court in which each such suit, occurring either prior to or subsequent to the incident here in question.

Response:

A. Two;

B. May 21, 1974, and January 17, 1974;

C. George Edward Weatherley, Prairie County, Arkansas

Rosendo Perez, Palm Beach, Florida;

D. In the accident involving Rosendo Perez, it appears that Perez was operating a backhoe attached to a Ford tractor while standing on the back of the tractor and reaching across the seat of the backhoe to the controls on the backhoe. The tractor/backhoe was positioned on the back of a lagoon with the front of the tractor uphill and the backhoe headed down the slope of the back toward the

water. The operator was attempting to dig a hole for the planting of a tree. There were no witnesses to the accident itself, but it appeared that the tractor rolled down the soft bank jamming the bucket of the backhoe into the hole being dug and causing the backhoe to be lifted upward. Perez was trapped between the seat and the control panel of the backhoe and the upper cross member of the rollbar/canopy attached to the tractor.

In the Weatherley accident, the backhoe was attached to a Deutz tractor and was apparently being used to build up the dikes or levels in a rice field. The accident was not witnessed, but it appears that the tractor, which was positioned at right angles to the levy, rolled backward into a ditch that ran along the levy causing the stabilizer pads on the tractor to jam into the back of the levy and lift the backhoe upward. Weatherley was caught between the control panel of the backhoe and the upper cross member of the rollbar/canopy.

E. Suit was filed against Long Mfg., N.C., Inc., and the selling dealer in the Perez case and it was filed against Long Mfg., N.C., Inc., and the seller dealer, Deutz Tractor Company in the Weatherley case.

The Perez case was filed in the Palm Beach Circuit Court on 9/23/75.

The Weatherly case was filed in Circuit Court, Prairie County, Arkansas, on 9/26/74.

The Perez case was settled prior to trial and the Weatherley was tried out with a resultant jury verdict in favor of Long Mfg., N.C., Inc., and the other parties.

APPENDIX B

Rule 26. Federal Rules of Civil Procedure:

GENERAL PROVISIONS GOVERNING DISCOVERY

(b)(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 33. Federal Rules of Civil Procedure:

INTERROGATORIES TO PARTIES

(a) *Availability; Procedures For Use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if

any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

Rule 37, Federal Rules of Civil Procedure:

FAILURE TO MAKE DISCOVERY: SANCTIONS

(a)(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

Rule 401, Federal Rules of Evidence:

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403, Federal Rules of Evidence:

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 407, Federal Rules of Evidence:

SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur,

evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Ga. Code Ann. § 20-701:

BY WHOM CONTRACTS CONSTRUED

The construction of a contract is a question of law for the court. Where any matter of fact is involved (as the proper reading of an obscurely written word), the jury should find the fact.

Ga. Code Ann. § 38-510:

MISTAKE IN DEED OR CONTRACT IN WRITING

Parol evidence is admissible to prove a mistake in a deed or any other contract required by law to be in writing.

Ga. Code Ann. § 39-604:

EFFECT OF CONTRACT NOT TO ENFORCE EXECUTION

An agreement for a valuable consideration never to enforce a judgment or execution shall release the judgment or execution.

Ga. Code Ann. § 105-2012:

RIGHT OF CONTRIBUTION

(1) Where the tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if they had been jointly sued.

(2) If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution.